Supreme Court, U.S.
FILED

981698 APR 22 1999

No. _____

In The

Supreme Court of the United States

October Term, 1998

RICARDO RENTERIA-PRADO,

Petitioner,

v.

KENNETH L. PASQUARELL, as District Director of the San Antonio District of the Immigration and Naturalization Service; DORIS MEISSNER, as the INS Commissioner; THE IMMIGRATION AND NATURALIZATION SERVICE, as an agency of the United States; and JANET RENO, as the Attorney General of the United States,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

SIMON M. AZAR-FARR
Counsel of Record
SIMON AZAR-FARR & ASSOC., P.C.
2313 North Flores
San Antonio, TX 78212
(210) 736-4122 Telephone
(210) 736-4143 Facsimile

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

52pp

QUESTIONS PRESENTED

1. Whether § 242(g) of the Immigration and Nationality Act, 8 U.S.C. § 1252(g), which states, "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien rising from the decision or action by the Attorney General to . . . execute **removal** orders," strips the federal courts of jurisdiction to review a decision of the Attorney General to execute a prior **exclusion** order, particularly in light of: a) § 309(d)(2) of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), which states that references in law to removal orders incorporate exclusion orders; and b) IIRIRA § 309(a), which gives the effective date of the IIRIRA (including § 309(d)(2)) as April 1, 1997, making clear that § 309(d)(2) shall not operate retroactively. IIRIRA, Div. C., Department of Defense Appropriations Act, Pub. L. 104-208, § 306 (Sept. 30, 1996), 110 Stat. 3009 (as amended by Pub. L. 104-302 (Oct. 11, 1996), 110 Stat. 3656 (codified at 8 U.S.C. § 1252) (Supp. 1998)).

2. Whether the Attorney General's promulgation of 8 U.S.C.§ 1231(a)(5) in 8 C.F.R. § 241.8 was in excess of statutory authority and thus violated the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706.

3. Whether Mr. Renteria is entitled to a declaration of his right pursuant to 28 U.S.C. §§ 2201, 2202 to a removal hearing under 8 U.S.C. §§ 1229 and 1229a before removal from the United States and a writ of mandamus pursuant to 28 U.S.C. § 1361 ordering the Immigration and Naturalization Service ("INS") to allow his return to the United States.

LIST OF PARTIES

Petitioner, plaintiff-appellant below, is Ricardo Renteria-Prado.

Respondents, defendants-appellees below, are Kenneth L. Pasquarell, as District Director of the San Antonio District of the Immigration and Naturalization Service; Doris Meissner, as the INS Commissioner; The Immigration and Naturalization Service, as an agency of the United States; and Janet Reno, as the Attorney General of the United States.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

Cases vii

Statutory Provisions viii

Regulations ix

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Statement of Facts 2

B. Statement of Jurisdiction of the Court of First Instance 4

REASONS FOR GRANTING THE PETITION 5

A. Petitioner's Case Involves the Fifth Circuit Court of Appeals Decision of an Important Question of Federal Law Which Has Not Been, but Should Be, Settled By the Supreme Court, a Decision Which Conflicts With the Court's Recent Decision in *Reno v. Arab-American Anti-Discrimination Committee* 5

TABLE OF CONTENTS – Continued

Page

B. INA § 242(g), 8 U.S.C. § 1252(g), is Properly Understood to Cover Only Orders of Removal, not Orders of Exclusion or Deportation; the Fifth Circuit's Reading Renders Part of § 1252(g) Meaningless 8

1. INA § 309(d)(2) does not apply to Petitioner's case, because it only applies prospectively, not retrospectively, to future exclusion or deportation orders; any other reading renders § 1252(g) meaningless 9

2. Petitioner's narrow, literal reading of § 1252(g) tracks the Court's exacting reading of § 1252(g) in its recent decision, *AAADC* 12

3. Petitioner's reading of § 1252(g) makes sense of the statutory scheme as a whole, like the Court's reading of § 1252(g) in *AAADC* 13

4. Petitioner's narrow interpretation of § 1252(g) makes sense in light of congressional intent, as articulated by the Court in *AAADC*, with respect to § 1252(g)..... 15

C. The Attorney General Exceeded Her Authority to Interpret Statutes in Violation of the APA When She Promulgated the Language of 8 U.S.C. § 1231(a)(5) in 8 C.F.R. § 241.8 17

1. Congress's intent in passing 8 U.S.C. § 1231(a)(5) is clear and unambiguous; reinstatement of a prior removal order may not be reviewed by the courts, but there must be a prior lawful removal order for a reinstatement to be unreviewable 19

TABLE OF CONTENTS – Continued

Page

2. Orders of deportation, orders of exclusion, and orders of removal are each separate concepts with distinct consequences and procedures; "removal" was intended to replace "exclusion" and "deportation" 19

3. Congress intentionally did away with exclusion and deportation proceedings, creating removal proceedings; the statutory scheme and the specific language employed by Congress demonstrates its recognition of the distinctions between exclusion, deportation, and removal 21

4. Because Congress intended the demise of exclusion and deportation throughout the INA, an interpretation of § 1231(a)(5)'s language of "order of removal" to include "order of exclusion" and "order of deportation" is inconsistent with the plain language of the statute read as a whole 23

5. Additional support for reading § 1231(a)(5) as inapplicable to orders of exclusion and deportation entered before April 1, 1997 ... 24

6. The Attorney General's insertion of language into § 1231(a)(5) violates the APA and is a usurpation of legislative power from Congress 25

7. The Court has the authority to review a claim that a regulation violates the APA; if the Court finds a violation, it can set aside that regulation 26

TABLE OF CONTENTS – Continued

Page

D. Mr. Renteria Seeks a Declaration of His Right to Removal Proceedings (Under 8 U.S.C. §§ 1229, 1229(a)) Before Removal from the United States Pursuant to 28 U.S.C. §§ 2201 and 2202 and a Writ Of Mandamus Ordering the INS to Allow His Return to the United States Pursuant to 28 U.S.C. § 1361 28

1. Because this controversy is within this Court's, as well as the appellate and district courts' jurisdiction, Mr. Renteria qualifies for a declaration that he is entitled to proper removal proceedings before being removed from the United States..... 28

2. The INS owed a duty to Mr. Renteria to grant him proper removal proceedings, and he was not granted those proceedings before being removed; a mandamus ordering the INS to allow him to return to the United States for proper proceedings is in order..... 29

CONCLUSION 30

APPENDIX .....App. 1

TABLE OF AUTHORITIES

Page(s)

CASES

Aberdeen & Rockfish Railroad Co v. United States, 682 F.2d 1092 (5th Cir. 1982) 18

Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 18

Estate of Sanford v. Commissioner, 308 U.S. 39 (1939) 27

Fed. Elec. Com'n v. Dem. Senatorial Campaign Com., 454 U.S. 27 (1981) 27

Garcia v. United States, 88 F.3d 318 (5th Cir. 1996) 24

Global Van Lines, Inc. et al., v. ICC, 714 F.2d 1290 (5th Cir. 1983) 26

Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968) 27

Hughes Aircraft Co. v. Schumer, 117 S.Ct. 1871 (1997) 10

Intern. Broth. of Teamsters, Etc. v. Daniel, 439 U.S. 551 (1979) 27

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 18, 23

INS v. Phinpathya, 464 U.S. 183 (1984) 18

Landgraf v. USI Film Productions, Inc., 511 U.S. 244 (1994) 9, 10

Landon v. Plasencia, 459 U.S. 21 (1982) 20

Matter of Shaar, Int. Dec. #3290 (BIA 1996) 19

Mendez-Rosas v. INS, 87 F.3d 672 (5th Cir. 1996) 9

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 24

TABLE OF AUTHORITIES – Continued

Page

NLRB v. Brown, 380 U.S. 278 (1965) 27

NLRB v. United Food and Commercial Workers Union, 484 U.S. 112 (1987) 18

Reno v. American-Arab Anti-Discrimination Committee, et al., 1999 U.S. LEXIS 1514 (1999) 6, 8, 12, 13, 14, 15

Renteria-Prado v. Pasquarell, No. 98-50536 (5th Cir. Feb. 19, 1999) (per curiam) 2, 7

United States v. Barlow, 41 F.3d 935 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1804 (1995) 18

White v. INS, 75 F.3d 213 (5th Cir. 1996) 18

Williams v. St. Clair, 610 F.2d 1244 (5th Cir. 1980) 18

Witter v. INS, 113 F.3d 549 (1997) 17

Woodby v. INS, 385 U.S. 276 (1966) 21

Zuber v. Allen, 396 U.S. 168 (1969) 27

STATUTORY PROVISIONS

IIRIRA § 304 (codified at Title 8 U.S.C. §§ 1229, 1229a, 1229b, 1229c (Supp. 1997)) 21

IIRIRA § 306 ..... 1, 11, 13, 14

IIRIRA § 308 ..... 22, 23

IIRIRA § 309 ..... *passim*

Title 5 U.S.C. §§ 701-706 (The Administrative Procedures Act) 5, 26, 29

TABLE OF AUTHORITIES – Continued

Page

Title 8 U.S.C. § 1101(g) 22

Title 8 U.S.C. § 1105(a) 21

Title 8 U.S.C. § 1182(d)(12)(A) 22

Title 8 U.S.C. § 1225 21

Title 8 U.S.C. § 1226 21

Title 8 U.S.C. §§ 1229, 1229a, 1229b, 1229c (Supp. 1997) 7, 11, 17, 28, 29

Title 8 U.S.C. § 1231(a)(5) ..... *passim*

Title 8 U.S.C. § 1252(g) ..... *passim*

Title 8 U.S.C. § 1254(a) and (f) 21

Title 8 U.S.C. § 1255(a), (c) and (i) 21, 25

Title 8 U.S.C. § 1326(a) 23

Title 28 U.S.C. § 1254 2

Title 28 U.S.C. § 1331 5

Title 28 U.S.C. § 1361 ..... 5, 28, 29

Title 28 U.S.C. § 1367(a) 5

Title 28 U.S.C. § 1651 ..... 5, 29

Title 28 U.S.C. §§ 2201, 2202 ..... 5, 28

REGULATIONS

8 C.F.R. § 212.2(e) 25

8 C.F.R. § 241.8 ..... *passim*

PETITION FOR WRIT OF CERTIORARI

Petitioner Ricardo Renteria-Prado, by and through his attorneys, Simon Azar-Farr & Associates, P.C., respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on February 19, 1999.

OPINIONS BELOW

By order dated May 26, 1998, District Court Judge H.F. Garcia granted Respondents' motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. Certified Administrative Record Vol. 2 at 254, 351.[1] Judge Garcia relied on §§ 306(c) and 309(d)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), § 242(g) of the Immigration and Nationality Act, as amended ("INA"), 8 U.S.C. § 1252(g), and INA § 241(a)(5), 8 U.S.C. § 1231(a)(5), to conclude that the district court was stripped of jurisdiction to review Mr. Renteria's claims. 2 R. at 352. In its memorandum opinion, the district court failed to address Petitioner's contention that 8 C.F.R. § 241.8 was promulgated in excess of statutory authority and therefore was unlawful and should be set aside. 2 R. at 352.

In a decision dated February 19, 1999, the United States Court of Appeals for the Fifth Circuit affirmed the

---

[1] References to the Record on Appeal are hereafter designated by the number of the record volume assigned by the Clerk of the Fifth Circuit Court followed by "R." and the pertinent page number(s).

district court's dismissal of Petitioner's claim on the basis that INA § 242(g) eliminates federal subject matter jurisdiction over decisions of the Attorney General to execute prior orders of exclusion, specifically Petitioner's prior order. *Renteria-Prado v. Pasquarell*, No. 98-50536 (5th Cir. Feb. 19, 1999) (summary calendar) (per curiam). Judgment was entered on February 19, 1999.

JURISDICTION

The judgment and opinion of the court of appeals was entered on February 19, 1999. This petition is filed within 90 days of that entry of judgment, pursuant to Sup. Ct. R. 13.1. The Supreme Court has jurisdiction under Title 28 U.S.C. § 1254, which states that "cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATUTORY AND REGULATORY PROVISIONS INVOLVED

See Appendix.

STATEMENT OF THE CASE

A. Statement of Facts

The facts are not significantly in dispute. Mr. Renteria first came to the United States in or about 1982. 1 R. at 3. He married Ms. Arlene Vidales, a United States citizen, on October 5, 1984. 1 R. at 3, 4. *See* Exhibit # 1; 1 R. at 17. Sometime in 1985, upon his return from Mexico, Mr. Renteria was placed in exclusion proceedings by Respondent INS. 1 R. at 4. He was charged with

excludability under former INA §§ 212(a)(19) and (20), 8 U.S.C. § 1182(a)(19) and (20) (repealed and renumbered by the Immigration Act of 1990, Pub. L. 101-649, § 601(a) (Nov. 29, 1990), 104 Stat. 5067) (excludability as a result of engaging in a sham marriage solely to obtain immigration benefits). *Id. See* Exhibit # 2; 1 R. at 19. On October 10, 1985, following a hearing before an Immigration Judge, Mr. Renteria was found excludable as charged and ordered excluded from the United States. 1 R. at 4. *See* Exhibits # 3; 1 R. at 21; and Exhibit # 4; 1 R. at 90; respectively. On that day, Mr. Renteria filed a timely notice of appeal to the Board of Immigration Appeals ("Board"), seeking review of the order of exclusion. 1 R. at 4. *See* Exhibit # 5; 1 R. at 98.

In late 1985 (shortly after he was ordered excluded), Mr. Renteria entered the United States without inspection while awaiting a decision from the Board on his appeal of the exclusion order. 1 R. at 4. *See* Exhibit # 6; 1 R. at 100. He returned to his employment at Drury Southwest, Inc. in San Antonio, Texas. 1 R. at 5. *See* Exhibit # 7; 1 R. at 103; and Exhibit # 8; 1 R. at 106; respectively. Eventually, on May 7, 1987, (following a long separation), Mr. Renteria and Ms. Vidales were divorced. 1 R. at 5. *See* Exhibit # 9; 1 R. at 110.

On July 11, 1987, Mr. Renteria married Ms. Emerita Renteria, a United States citizen, in San Antonio, Texas. 1 R. at 5. *See* Exhibit # 10; 1 R. at 115. They are the biological parents of two children, Jennifer and Alex, ages 10 and 4 respectively, who are both United States citizens. 1 R. at 5. *See* Exhibit # 11; 1 R. at 118; and Exhibit # 12; 1 R. at 120.

In April 1988, the Renteria family purchased a house at 5410 Sea Horse in San Antonio, Texas. 1 R. at 5. *See*

Exhibit # 13; 1 R. at 122. The family was still living there on August 16, 1990, when the Board dismissed Mr. Renteria's appeal and ordered him excluded from the United States. 1 R. at 5, 6. *See* Exhibit # 14; 1 R. at 134.

On or about July 18, 1997, Respondent INS arrested Mr. Renteria in the morning when he was on his way to work and transferred him to San Angelo, Texas, for processing. 1 R. at 7. Shortly after his arrest, Mr. Renteria's family retained the services of the undersigned counsel. *Id.* The undersigned counsel contacted Respondent INS and inquired about the institution of removal proceedings so that Mr. Renteria could apply for cancellation of removal; instead, the undersigned counsel was informed that Respondent INS intended to "reinstate" the Board's August 16, 1990, "order of deportation" and deport Mr. Renteria without placing him in removal proceedings before an Immigration Judge. *Id. See* Exhibit # 20; 1 R. at 185. Counsel for Mr. Renteria then contacted Mr. Gregory Ball, the INS's district counsel, and the INS's Deportation Section, inviting them to refrain from removing Mr. Renteria until he was properly placed in removal proceedings and a legal and valid order of removal, if any, was obtained. 1 R. at 7, 8. *See* Exhibit # 21; 1 R. at 190. Respondent INS disregarded the invitation to refrain from removing Mr. Renteria without first placing him in removal proceedings, and Mr. Renteria was subsequently removed from the United States some time in the late afternoon of July 22, 1997. 1 R. at 8.

B. Statement of Jurisdiction of the Court of First Instance

Petitioner, Mr. Renteria, filed for declaratory and mandamus relief in the United States District Court for

the Western District of Texas, which has jurisdiction over Mr. Renteria's claim under: Title 5 U.S.C. §§ 701, 702, 704 and 706 (agency action, right of review, actions reviewable, and unlawful agency regulation), Title 28 U.S.C. § 1331 (federal question), Title 28 U.S.C. §§ 2201, 2202 (in a case of actual controversy within its jurisdiction . . . any court of the United States, upon filing of an appropriate pleading, may declare rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought), Title 28 U.S.C. § 1651 (the All Writs Act), Title 28 U.S.C. § 1367(a) (supplemental jurisdiction), and Title 28 U.S.C. § 1361 (vests district courts with original jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff). The district and appellate courts held below that such jurisdiction was revoked by INA § 242(g), 8 U.S.C. § 1252(g); this is the primary issue contested here by Mr. Renteria, and is explained at length below.

REASONS FOR GRANTING THE PETITION

A. Petitioner's Case Involves the Fifth Circuit Court of Appeals' Decision of an Important Question of Federal Law Which Has Not Been, but Should Be, Settled By The Supreme Court, a Decision Which Conflicts With the Court's Recent Decision in *Reno v. Arab-American Anti-Discrimination Committee.*

Mr. Renteria's petition for writ of certiorari squarely falls within the reasons the Court uses for granting a writ of certiorari as explained in Supreme Court Rule 10(c), in that "a state court or a United States court of appeals has decided an important question of federal law that has not

been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law, that is, the extent to which INA § 242(g), 8 U.S.C. § 1252(g), strips the district and appellate courts of jurisdiction over the Attorney General's decisions to execute prior orders of exclusion, specifically whether it does so with respect to Mr. Renteria's prior order. This issue has not been settled by the Supreme Court, but should be, as the Fifth Circuit's interpretation of § 1252(g) conflicts with long-established rules of statutory construction in that it renders part of § 1252(g) meaningless. Furthermore, the Fifth Circuit's interpretation of § 1252(g) does not comport with this Court's recent decision in *Reno v. Arab-American Anti-Discrimination Committee*, 1999 U.S. LEXIS 1514 (1999) (decided subsequent to the Fifth Circuit's decision), which, while not addressing the exact issue decided by the Fifth Circuit in this case, does explain in great detail the meaning of § 1252(g), specifically illuminating the meaning of the phrase in question here: "commence proceedings, adjudicate cases, and execute removal orders." The Fifth Circuit dismissed Mr. Renteria's case using broad language and a broad reading of § 1252(g), a reading that does not hold up given this Court's subsequent subtle and exacting explanation of the meaning of § 1252(g) in *AAADC*.

The Fifth Circuit held that INA § 242(g), 8 U.S.C. § 1252(g), and 8 C.F.R. § 241.8 preclude the district and appellate courts from reviewing any decision of the Attorney General to execute a removal order or any execution of a prior removal order. Whether or not the courts

have been stripped of jurisdiction by these provisions to review claims arising from execution of removal orders and from reinstatements of prior removal orders is not at issue, so the Court need not address it. Mr. Renteria's claim arises under the APA and more specifically under an exclusion order. Mr. Renteria has no prior removal order, only an order of removal effectuated without review as required by 8 U.S.C. §§ 1229, 1229a, 1229b, and 1229c. Thus, this Court, as well as the district and appellate courts, is not stripped of jurisdiction to hear Mr. Renteria's claim by INA § 242(g) and 8 C.F.R. § 241.8.

The Fifth Circuit's decision in this case hinged on its holding that "a decision to execute an order of exclusion and deportation is clearly contemplated within the meaning of § 242(g) [§ 1252(g)]," and furthermore that Mr. Renteria's exclusion order in particular is covered by the statute. *Renteria-Prado*, No. 98-50536, slip op. at 3. The court reached this conclusion by reading § 1252(g) in conjunction with another provision of the IIRIRA, § 309(d)(2), which states, "Any reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of exclusion." The court thereby determined that the term "removal order" in § 1252(g) also covered *all* orders of exclusion or deportation. The court did not address or attempt to justify the problem raised by this reading of § 309(d)(2), namely, that such a reading renders the term "removal" in § 1252(g) meaningless. A statutory interpretation which renders part of the statute meaningless is invalid. Mr. Renteria urges this Court to consider another interpretation, one which does not render part of

§ 1252(g) meaningless, which makes sense of the statutory scheme as a whole, and which is supported by the Court's recent decision in *AAADC*.

B. INA § 242(g), 8 U.S.C. § 1252(g) is Properly Understood to Cover Only Orders of Removal, not Orders of Exclusion or Deportation; The Fifth Circuit's Reading Renders Part of § 1252(g) Meaningless.

"Removal" is a term of art created by the enactment of the IIRIRA. As discussed in section C below, "removal" is a concept distinct from both "exclusion" and "deportation." The term "removal" in the context of "commence proceedings, adjudicate claims, and execute removal orders" means exactly what it says, and no more. If "removal" in this context means "removal, deportation, or exclusion," then nothing is gained by the exclusive use of the word "removal." Presumably, § 1252(g)'s reference to "proceedings" and "claims," which does not specify specific, single types of proceedings or claims, includes all three types: removal, deportations, and exclusion. With respect to "orders," on the other hand, had Congress intended § 1252(g) to cover deportation and exclusion orders, as well as removal orders, it would not have specified only "removal," but simply left "orders" unmodified, as it had with "proceedings" and "cases." Therefore, § 1252(g) is properly understood to mean "commence exclusion, deportation or removal proceedings, adjudicate exclusion, deportation or removal cases, and execute removal orders." This interpretation is the sole approach which gives any meaning whatsoever to the word "removal" in the context of its phrase in § 1252(g).

1. INA § 309(d)(2) does not apply to Petitioner's case, because it only applies prospectively, not retrospectively, to future exclusion or deportation orders; any other reading renders § 1252(g) meaningless.

How, then, is § 1252(g) to be squared with § 309(d)(2), which the Fifth Circuit interpreted as rendering references to "removal orders" to include *all* orders of exclusion or deportation? First, IIRIRA § 309(a) makes clear that, except for enumerated exceptions not relevant here, "this subtitle and the amendments made by this subtitle shall take effect" on April 1, 1997. This includes § 309(d)(2). The section is titled "Transitional References." By its terms, it applies to "transitional references" that were more particularly set forth in IIRIRA § 309(c), titled "Transition for Aliens in Proceedings," meaning to those who were in on-going exclusion or deportation proceedings when the IIRIRA went into effect on April 1, 1997. Consequently, the terms of § 309(d)(2) apply to orders of exclusion or deportation that went into effect after April 1, 1997, in accordance with § 309(c). Any other interpretation would unnecessarily raise serious retroactivity issues.

The Supreme Court has recently explained the process for determining whether or not a statute applies retroactively in *Landgraf v. USI Film Productions, Inc.*, 511 U.S. 244 (1994). After observing that "retroactivity has long been disfavored," the Court stated that, "the court's first task is to decide whether Congress has prescribed the statute's reach." *Landgraf*, 511 U.S. at 268, 280.[2] If

---

[2] *See also Mendez-Rosas v. INS*, 87 F.3d 672, 674 (5th Cir. 1996) ("First, we must determine whether Congress has clearly

Congress clearly intended for a statute to apply retroactively, then that intent governs and there is no need to resort to interpretation. *Landgraf*, 511 U.S. at 264 (quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837-38 (1990)). Congress never even intimated, much less expressly stated, that § 309(d)(2) of the IIRIRA should be applied retroactively. Therefore, this Court must presume its application is not retroactive.[3]

Furthermore, the Supreme Court stated in *Landgraf*, "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Id.* at 257. As stated above, § 309(a) states that § 309 will take effect on April 1, 1997. The fact that Congress chose to include an effective date further demonstrates Congress's intent for only a prospective application of the

---

expressed an intent that the statute be applied retroactively . . . . If Congress has clearly expressed an intention that a statute be applied retroactively . . . then the statute should be construed in accordance with that intent.") (internal citation omitted).

[3] *See Hughes Aircraft Co. v. Schumer*, 117 S. Ct. 1871 (1997) (There must be a clear intent by Congress that a statute be applied retroactively, or else no retroactive application is permissible.); *Goncalves v. Reno*, 144 F.3d 110, 113 (1st Cir. 1998), *cert. denied*, 1999 U.S. LEXIS 1726 (1999) (in which the court held that "Congress did not intend its new provisions restricting such discretionary relief [IIRIRA § 212(c)] to apply retroactively"); *Henderson v. INS*, 157 F.3d 106, 130 (2nd Cir. 1998), *cert. denied*, 1999 U.S. LEXIS 1730 (1999) (in which the court held that IIRIRA § 440(d) did not apply retroactively, because "under ordinary rules of statutory construction, a statute that is silent with respect to retroactivity is not 'ambiguous.' In the absence of clear evidence that Congress intended some other result, such a statute does not apply retroactively.")

section, including § 309(d)(2). Since Mr. Renteria's prior order of exclusion was issued in 1985, § 309(d)(2) does not apply to change his order of exclusion into an order of removal for the purposes of denying this Court or the District Court of jurisdiction. 1 R. at 4.[4]

In addition to retroactivity concerns, the Fifth Circuit's reading of § 309(d)(2) renders the language of INA § 1252(g) meaningless. If "removal" in the context of "commence proceedings, adjudicate claims, and execute removal orders" means "removal, deportation, or exclusion," then nothing is gained by the use of the word "removal." Mr. Renteria's reading of § 1252(g) and § 306(c)(1) in light of § 309(d)(2), in which § 1252(g) refers only to cases after April 1, 1997, resolves this seeming difficulty.

---

[4] Let us consider the following hypothetical. A thirty-year-old woman enters the United States without inspection in 1950. She is found two weeks later and deported. She reenters a few days after her deportation. She leads an uneventful life in this country. For whatever reasons (perhaps because of lack of knowledge of English or mere indigency), she never takes the time to obtain lawful status in this country. In July 1997, when she is almost 77 years old, she is found by Respondents. If she is placed in removal proceedings, as it is her right, she can apply for cancellation of removal under 8 U.S.C. § 1229b(b) or for registry under 8 U.S.C. § 1259 and obtain lawful status in this country. Congress clearly meant those forms of relief for persons like her. But under Respondents' view of 8 U.S.C. § 1231(a)(5) and 8 C.F.R. § 241.8, the INS is required, without exception and without the exercise of any discretion, to reinstate the 1950 order of deportation and without placing her in removal proceedings and affording her the opportunity to apply for residence remove her from this country.

2. Petitioner's narrow, literal reading of § 1252(g) tracks the Court's exacting reading of § 1252(g) in its recent decision, *AAADC*.

The Supreme Court's reading of § 1252(g) in *AAADC*, decided subsequent to the Fifth Circuit's decision in Mr. Renteria's case, provides guidance in interpreting § 1252(g). In *AAADC*, the Court was not presented with the specific question of the meaning of "removal" in the context of § 1252(g)'s "commence proceedings, adjudicate cases, and execute removal orders," but the Court did provide a very narrow and specific reading of the phrase as a whole which comports with Mr. Renteria's understanding of the statute. The Court arrived at its very specific understanding of § 1252(g) in an effort to avoid redundancy with other statutes and in order to give each of the provisions in question, especially § 1252(g), substance and meaning. The understanding of § 1252(g) put forth by Mr. Renteria is similarly the result of an effort to give meaning to each part of the statute, a goal which the Fifth Circuit's decision fails to address and ultimately fails to resolve.

In *AAADC*, the Attorney General argued in favor of a general reading of § 1252(g)'s language of "commence proceedings, adjudicate cases, and execute removal orders" to refer to the entire scope of the Attorney General's prosecutorial discretion. The Court rejected this reading, instead stating that "§ 1252(g) . . . is much narrower. The provision applies only to three discrete actions that the Attorney General may take: her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.' " *AAADC*, 1999 U.S. LEXIS 1514 at *21. The Court continued, "It is implausible that the

mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings . . . because [that interpretation] . . . is incompatible with the need for precision in legislative drafting." *Id.* Finally, the Attorney General's interpretation of § 1252(g) rendered it redundant and therefore meaningless. The Court said, "That problem is solved by our more conventional solution: reading . . . 'commence proceedings, adjudicate cases, or execute removal orders' . . . to mean precisely what [it] say[s]." *Id.* at *26. Mr. Renteria's interpretation of § 1252(g) reflects exactly these concerns, that the statute be read narrowly to cover precisely what it states, and nothing else, and in a manner that does not render parts of it meaningless.

3. Petitioner's reading of § 1252(g) makes sense of the statutory scheme as a whole, like the Court's reading of § 1252(g) in *AADC*.

Another outcome of the Court's narrow reading of § 1252(g) in *AADC* was to "make sense of the statutory scheme as a whole, for it resolves the supposed tension between § 306(c)(1) and § 309(c)(1)." *Id.* at *27. The Court explained:

> This incorporation does not swallow § 309(c)(1)'s general rule that §§ 1252(a)-(f) do not apply to pending cases, for § 1252(g) applies to only a limited subset of deportation claims. Yet it is also faithful to § 306(c)(1)'s command that § 1252(g) be applied "without limitation" (i.e., including the "except as provided" clause) to "claims arising from all past, pending, or future exclusion, deportation, or removal proceedings."

Id. at *27-28. Mr. Renteria's interpretation likewise makes sense of the statutory scheme as a whole, remaining true to § 306(c)(1), in that § 1252(g) applies without limitation to claims arising out of decisions to commence proceedings or adjudicate cases with respect to all past, pending, or future exclusion, deportation, and removal cases; § 1252(g) also applies without limitation to decisions to execute removal orders (which, being a creation of the new statute, will necessarily be only in the future).

In *AADC*, this Court was not faced with the task of interpreting the meaning of § 309(d)(2), which states, "[a]ny reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation." However, this provision only makes sense, in light of the language of § 1252(g), when it is properly understood to apply to orders of exclusion or deportation which are entered after April 1, 1997, the effective date of the statute. If read otherwise, the word "removal" in the phrase "execute removal orders" in § 1252(g) would be utterly meaningless.

Respondents may claim that Mr. Renteria's interpretation of § 309(d)(2) would render it meaningless, arguing that all orders entered after the effective date of the statute will be orders of removal, thereby not requiring any need to incorporate exclusion and deportation orders entered after that date, as none will exist. This argument fails to acknowledge the statute's special provisions regarding cases pending as of the effective date. Under § 309(c)(1)(B), "proceedings (including judicial review thereof) shall continue to be conducted without regard to [the IIRIRA] amendments." Exclusion or deportation proceedings pending at the time of the effective

date are not converted into removal proceedings. Even the rules regarding judicial review of these proceedings are retained. Therefore, any orders resulting from these hearings would be either exclusion or deportation orders. Sec. 309(d)(2) is addressed to *these* orders, entered after the effective date. Lest this seem too limited an understanding of § 309(d)(2), an examination of this Court's view of § 1252(g) in *AAADC* reveals an exactly parallel understanding. The Court explained:

> § 1252(g) is redundant if it channels judicial review of only *some* decisions and actions, since § 1252(b)(9) channels judicial review of *all* of them anyway. But that is not so, since only § 1252(g), and *not* § 1252(b)(9), . . . applies to what § 309(c)(1) calls "transitional cases," that is, cases pending on the effective date of the IIRIRA. That alone justifies its existence. *Id.* at *22.

Likewise, § 309(d)(2) applies only to transitional, that is, pending cases. Surely such a reading cannot be dismissed as overly limited, when the Court understands § 1252(g) in just such a limited fashion.

4. Petitioner's narrow interpretation of § 1252(g) makes sense in light of congressional intent, as articulated by the Court in *AAADC*, with respect to § 1252(g).

In *AAADC*, this Court further supported its narrow interpretation of § 1252(g) by recognizing the purpose to be served for singling out these three discrete actions for non-reviewability, stating, "It is entirely understandable, however, why Congress would want only the discretion-protecting provision of § 1252(g) applied even to pending cases: because that provision is specifically directed at the

deconstruction, fragmentation, and hence prolongation of removal proceedings." *Id.* at *27. Mr. Renteria's reading of § 1252(g) likewise is grounded in an understandable congressional purpose. With respect to decisions concerning commencing proceedings and adjudicating cases, decisions which simply initiate proceedings in which the alien has the opportunity to plead his case, Congress had no problems including exclusion and deportation cases as well as removal cases. Execution of an order, on the other hand, is a much more final decision with immediate, severe and irreparable consequences for the alien. In this case, Congress specified only "removal" orders, thereby assuring only those aliens who had been processed completely under the new statutory regime of the IIRIRA, who had the opportunity to be aware of their rights and the legal ramifications of their many decisions throughout the course of litigation under this new regime, could be subject to an unreviewable decision to be removed after reinstatement. The finality and severity of this last action, execution of an order or removal, as compared to the two earlier actions in the list, commencement of proceedings and adjudication of cases, provides a clear reason for why Congress would single it out and limit its application.

Furthermore, judicial review of decisions to commence proceedings or adjudicate cases clearly "deconstruct[s]" and "fragment[s]" exclusion, deportation or removal proceedings. *Id.* Congress's purpose is to avoid such fragmentation. With respect to the execution of orders, on the other hand, there is no danger of deconstructing or fragmenting the proceedings. In this matter, the proceeding has already been completed. Judicial review of execution of orders, particularly those entered

years earlier under a different statutory regime, does not fragment, deconstruct or prolong "removal proceedings." *Id.* The nature of the decision to execute an order, which takes place *after* proceedings have been completed, and which is much more final and severe in consequence[5] than the other two types of actions, supports Mr. Renteria's claim that the plain meaning of § 1252(g) indicates that Congress intended to limit its statement with respect to "execute orders" to include only removal orders.

C. The Attorney General Exceeded Her Authority to Interpret Statutes in Violation of the APA When She Promulgated the Language of 8 U.S.C. § 1231(a)(5) in 8 C.F.R. § 241.8.

Because the Fifth Circuit determined that neither it nor the district court had jurisdiction, it did not consider Mr. Renteria's contention that the Attorney General exceeded her statutory authority in violation of the APA when she promulgated 8 U.S.C. § 1231(a)(5) in 8 C.F.R. § 241.8 to allow for reinstatement of orders of exclusion and deportation. Accepting Mr. Renteria's interpretation of § 1252(g) with respect to jurisdiction, it follows that the Attorney General may not expand the meaning of "removal" as found in § 1231(a)(5) to include "exclusion" or "deportation," as she did in 8 C.F.R. § 241.8. Mr. Renteria concedes that this Court must give deference to an executive administrative agency's interpretation of ambiguous statutory provisions.[6] More specifically, Mr.

---

[5] Unless placed in removal proceedings where he can at least apply for residency under Title 8 U.S.C. § 1229b(b), Mr. Renteria will never be able to immigrate to the United States notwithstanding his marriage to a United States citizen.

[6] *See Witter v. INS*, 113 F.3d 549, 552 (1997).

Renteria concedes that this Court is required to give deference to Respondents' interpretation of 8 U.S.C. § 1231(a)(5) in deciding whether the interpretation "has a reasonable basis in law."[7] However, if Congress's intent in passing a law can be clearly discerned, then the agency's regulation must be "fully consistent" with that intent. *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 120-21 (1987). Whether an agency's regulation exceeds Congress's intent is purely a question of law and for this Court to decide. *See NLRB*, 484 U.S. 112, relying on *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446-49 (1987), and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 and n. 9 (1984). In deciding the question, this Court must determine the congressional intent using "traditional tools of statutory construction," namely, the plain language, structure, and history of the statute, and then compare the intent with the actual language of the regulation. *NLRB*, 484 U.S. at 120-21 (internal citations omitted). *See INS v. Phinpathya*, 464 U.S. 183, 189 (1984) ("in all cases involving statutory construction, our starting point must be the language employed by Congress . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words."); *White v. INS*, 75 F.3d 213, 215 (5th Cir. 1996) (the task of interpreting a statute begins with an examination of the plain language); *United States v. Barlow*, 41 F.3d 935 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1804 (1995) (when statutory language is plain or unambiguous, the court may not resort to examination of the legislative

---

[7] *See, e.g., Aberdeen & Rockfish Railroad Co. v. United States*, 682 F.2d 1092, 1096 (5th Cir. 1982); and *Williams v. St. Clair*, 610 F.2d 1244 (5th Cir. 1980).

history); and *Matter of Shaar*, Int. Dec. # 3290 (BIA 1996) (when statutory language is plain, that is the end of inquiry). Abiding by these well-established rules, this Court will find that the Attorney General's interpretation of § 1231(a)(5) exceeds the bounds intended by Congress.

1. Congress's intent in passing 8 U.S.C. § 1231(a)(5) is clear and unambiguous; reinstatement of a prior removal order may not be reviewed by the courts, but there must be a prior lawful removal order for a reinstatement to be unreviewable.

The language of 8 U.S.C. § 1231(a)(5) states, in relevant part, that when an alien illegally reenters the country "after having been removed . . . under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed." The plain language of the statute requires that in order to reinstate a prior order of removal there must exist a prior lawful order of removal. If there is a prior lawful order of removal, the proper reinstatement of that order may not be reviewable. It follows, then, that if there is no prior order of removal upon which to base a reinstatement, this section does not preclude review.

2. Orders of deportation, orders of exclusion, and orders of removal are each separate concepts with distinct consequences and procedures; "removal" was intended to replace "exclusion" and "deportation."

Under the authority of § 1231(a)(5), the Attorney General promulgated 8 C.F.R. § 241.8 to read "after having been removed, or having departed voluntarily, *while under an order of exclusion, deportation, or removal* . . . ," as opposed to only "orders of removal" found in

§ 1231(a)(5) (emphasis added by Petitioner). The Attorney General exceeded the scope of § 1231(a)(5) by including the historically established and legally significant terms of "exclusion" and "deportation" within the language of the regulation. This assertion rests on the long-established and clear distinctions in the law between "exclusion" and "deportation," and on the distinctive characteristics of "removal" that set it apart from its predecessors.

The distinctions between "exclusion" and "deportation" have been statutorily prescribed and sanctioned by more than 50 years of jurisprudence. The difference was more than mere nomenclature. In *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) the Supreme Court noted that aliens in deportation proceedings were afforded procedural protections not available to those in exclusion proceedings by stating:

> An alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative. . . . However, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.

To summarize, those who had effected an entry into the United States were placed in deportation proceedings and were afforded constitutional protections under the Fifth Amendment to the Constitution. They enjoyed a variety of procedural safeguards such as: the government carried the burden of proof of deportability by clear and

convincing evidence;[8] the alien could apply for suspension of deportation under former 8 U.S.C. § 1254(a) and for the privilege of voluntary departure under former 8 U.S.C. § 1254(f); the alien could apply for adjustment of status under 8 U.S.C. § 1255(a) and (c); and the alien could appeal an unfavorable decision by the Board directly to a court of appeals and get an automatic stay of deportation under former 8 U.S.C. § 1105a(a).

Those placed in exclusion proceedings were afforded far fewer procedural benefits. For example, if an alien was ordered excluded, he was sent to the country from whence he came under former 8 U.S.C. §§ 1225 and 1226. His right to judicial review of an order of exclusion was limited to "habeas corpus proceedings and not otherwise" under former 8 U.S.C. § 1105a(b). The recently enacted IIRIRA, effective April 1, 1997, eliminated further institution of exclusion and deportation proceedings and in their stead placed expedited removal and removal proceedings, created by IIRIRA § 304 (codified at 8 U.S.C. §§ 1229, 1229a, 1229b and 1229c (Supp. 1997)).

3. Congress intentionally did away with exclusion and deportation proceedings, creating removal proceedings; the statutory scheme and the specific language employed by Congress demonstrates its recognition of the distinctions between exclusion, deportation, and removal.

Congress mandated that the removal provisions would go into effect on April 1, 1997. *See* IIRIRA § 309(a). However, Congress expressly accounted for exclusion and deportation proceedings that had begun before April

---

[8] *See Woodby v. INS*, 385 U.S. 276 (1966).

1, 1997, providing that those "proceedings (including judicial review thereof) shall continue to be conducted without regard to [the IIRIRA] amendments." IIRIRA § 309(c)(1)(B). Congress, therefore, recognized the important distinctions between exclusion and deportation and removal proceedings and took deliberate measures in § 309(c)(1)(B) to account for those distinctions. Also, in § 308 of the IIRIRA, Congress took pains to provide for conforming amendments. Where necessary, the terms "exclusion" and "deportation" or variations thereof were struck from the INA and in their stead, the term "removal" or a variation thereof was inserted. Exclusion, deportation and removal are all very different, and Congress went to great lengths to make that clear. Its intention was to amend away exclusion and deportation proceedings throughout the INA and create a new concept of removal. Congress, therefore, understood the differences between the historically established concepts of exclusion and deportation and the newly established concept of removal.

Congress's recognition of the distinction between removal, exclusion, and deportation is further demonstrated by its continued use of compound terms in some sections of the INA. Where Congress intended the scope of a statutory provision to include both orders of deportation and orders of removal, both are mentioned. For example, Congress added the term "removed" to the existing language of INA § 101(g), 8 U.S.C. § 1101(g) so that it now states, "For the purposes of this Act any alien ordered deported or removed . . . shall be considered to have been deported or removed. . . . " *See* IIRIRA § 308(e)(3). Similarly, INA § 212(d)(12)(A), 8 U.S.C. § 1182(d)(12)(A) provides that the Attorney General may

waive the application of 212(a)(6)(F)(i) "in the case of an alien lawfully admitted for permanent residence who temporarily proceeds abroad voluntarily and not under an order of deportation or removal." And, INA § 276(a), 8 U.S.C. § 1326(a), a section addressing criminal penalties for reentry of certain deported aliens, was amended by IIRIRA § 308(d)(4)(J) to include departures under executed or outstanding orders of exclusion, deportation, and removal as a basis of liability. Had Congress intended the phrase "order of removal" to include orders of exclusion and deportation it would not have continued to use compound terms in some sections of the INA, but instead would have amended all sections of the INA to refer only to orders of removal. The fact that Congress used the singular term "removal" in some sections of the INA while using compound terms in other sections of the INA requires that the term "removal" be given its facial meaning in § 1231(a)(5). *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (addressing the proper construction of Congress's use of different language in different sections of the same act).

4. Because Congress intended the demise of exclusion and deportation throughout the INA, an interpretation of § 1231(a)(5)'s language of "order of removal" to include "order of exclusion" and "order of deportation" is inconsistent with the plain language of the statute read as a whole.

As stated above, Congress included the "exclusion" and "deportation" language specifically in sections of the IIRIRA where they deemed it prudent. Logically, they also left it out where they deemed prudent. One section

of the IIRIRA where Congress chose to exclude that language is 8 U.S.C. § 1231(a)(5). The Attorney General interpreted that section in 8 C.F.R. § 241.8 to include "exclusion" and "deportation" as well as "removal" in spite of Congress specifically and deliberately excluding that language.

Congress is presumed to know what the law is when it enacts a new law.[9] For Respondents to assert that the terms "exclusion" and "deportation" are interchangeable with "removal" invites the Court to presume that Congress must have been ignorant of this nation's immigration laws when it passed the IIRIRA. That invitation does not comport with the presumption that Congress knows what the existing law is when it passes new legislation. For the foregoing reasons, Petitioner asserts that Congress intentionally excluded the terms "exclusion" and "deportation" from § 1231(a)(5). The Attorney General's interpretation of § 1231(a)(5) should have complied with that intent.

5. Additional support for reading § 1231(a)(5) as inapplicable to orders of exclusion and deportation entered before April 1, 1997.

There is additional support for reading § 1231(a)(5) as allowing only the reinstatement of orders of exclusion, deportation, and removal entered after April 1, 1997, the effective date of the IIRIRA. The INA now provides

---

[9] *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation"); and *Garcia v. United States*, 88 F.3d 318, 334 (5th Cir. 1996) (Garza, J., concurring) ("Congress must be presumed to have knowledge of its previous legislation when making new laws.").

notice to persons who are subject to lawful removal, exclusion, or deportation or who are contemplating unlawful reentry after April 1, 1997. INA § 241(a)(5) and 8 C.F.R. § 241.8 both constitute a warning to individuals that if they reenter the United States unlawfully, and are subsequently found in the United States, they will not only be subject to criminal penalties, but also will be denied any hearing before an Immigration Judge and will be deemed ineligible for any form of relief from expulsion from the United States.

INA § 245(i), 8 U.S.C. § 1255(i) also provides support for reading § 1231(a)(5) as inapplicable to orders of exclusion and deportation entered before April 1, 1997. This provision expressly allows aliens physically present in the United States on whose behalf visa petitions were filed prior to January 14, 1998 to adjust their status to that of permanent resident, even if they are unlawfully present in the United States. Section 1255(i) does not bar an individual whose entry followed a prior deportation from adjusting status. *See* 8 C.F.R. § 212.2(e). And, although, § 1255(i) has been amended since the enactment of § 1231(a)(5), Congress did not modify it to preclude adjustment of status in cases of reentry after deportation.

6. The Attorney General's insertion of language into § 1231(a)(5) violates the APA and is a usurpation of legislative power from Congress.

To reiterate, Mr. Renteria is not challenging Respondents' authority to interpret statutes entrusted to them to administer. Also, Mr. Renteria is not challenging the rule that a reviewing court is required to give deference to Respondents' reasonable interpretation of their own

administrative regulations. Instead, Mr. Renteria is challenging Respondents' authority to amend the language of the statute in impermissible ways. Mr. Renteria argues that Respondents have, under the guise of reasonable interpretation, added critical language to the statute that was intentionally omitted by Congress. The Attorney General exceeded the scope of § 1231(a)(5) in promulgating 8 C.F.R. § 241.8, thereby usurping the legislative powers of Congress.

The APA provides that a reviewing court must "set aside" an agency regulation if the regulation is found to be "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law." Title 5 U.S.C. § 706(2)(A). As argued above, Respondents did in fact exceed the bounds set in § 1231(a)(5) on their authority by adding language intentionally left out by Congress that resulted in greater power than Congress intended to grant. That usurpation is not in accordance with the law, and thus violates the APA.

7. The Court has the authority to review a claim that a regulation violates the APA; if the court finds a violation, it can set aside that regulation.

If an agency's regulation "departs [so far] from the statutory authorization that [it] can be interpreted as [coming under § 706(2)(A)]," then the Court can and indeed will set aside that regulation.[10] The reason for the

---

[10] *See Global Van Lines, Inc., et al. v. ICC*, 714 F.2d 1290, 1296 (5th Cir. 1983) (setting forth the well recognized rules "that an administrative agency cannot exceed the specific statutory authority granted it by Congress" and that an agency's regulations "may not exceed a statute or modify its provisions")

authority to review claims arising under the APA is clear; this Court has the duty and authority to decide if Respondents have transgressed the bounds fixed by Congress on their authority.[11] Without that authority, both judicial review and the legislative power would be illusory.[12] It is true that Respondents are presumed to have expertise with respect to technical problems within their jurisdiction; but they enjoy no particular expertise in matters of statutory interpretation, an area in which the courts are the final authority.[13] Because the Attorney General exceeded the bounds set by Congress in interpreting § 1231(a)(5), and because that usurpation of legislative authority was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," this Court should hold that regulation unlawful and invalid as a matter of law.

(citing *Atchison, Topeka & Santa Fe Railway v. ICC*, 607 F.2d 1199 (7th Cir. 1979)) (internal citations omitted).

[11] *See, e.g., Intern. Broth. of Teamsters, etc. v. Daniel*, 439 U.S. 551, 556 n. 20 (1979); *Zuber v. Allen*, 396 U.S. 168, 193 (1969); and *NLRB v. Brown*, 380 U.S. 278, 291 (1965).

[12] *See, e.g., Estate of Sanford v. Commissioner*, 308 U.S. 39, 52 (1939).

[13] *See, e.g., Fed. Elec. Com'n v. Dem. Senatorial Campaign Com.*, 454 U.S. 27, 31-32 (1981); and *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 14 (1968).

D. Mr. Renteria Seeks a Declaration of His Right to Removal Proceedings (Under 8 U.S.C. §§ 1229, 1229(a)) Before Removal from the United States Pursuant to 28 U.S.C. §§ 2201 and 2202 and a Writ Of Mandamus Ordering the INS to Allow His Return to the United States Pursuant to 28 U.S.C. § 1361.

Title 28 U.S.C. § 2201 states that "in a case of actual controversy within its jurisdiction . . . any court of the United States, upon filing of an appropriate pleading, may declare rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

The Mandamus Act, Title 28 U.S.C. § 1361, vests district courts with original jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Mr. Renteria seeks relief under both sections.

1. Because this controversy is within this Court's, as well as the district and appellate courts' jurisdiction, Mr. Renteria qualifies for a declaration that he is entitled to proper removal proceedings before being removed from the United States.

Mr. Renteria was removed from this country on July 22, 1997 without being placed in removal proceedings as required by 8 U.S.C. §§ 1229 and 1229a. 1 R. at 7-8. Respondents removed him pursuant to 8 C.F.R. § 241.8 by reinstating a prior exclusion order. But Mr. Renteria argues that the plain language interpretation of § 1231(a)(5) should be used in § 241.8 rather than the expansive language used by the Attorney General in promulgating § 1231(a)(5). Interpreting § 1231(a)(5) to

include "exclusion" and "deportation" orders, where Congress intentionally limited the language to "removal" orders only, is a violation of the APA § 706, reviewable by this Court under §§ 702 and 704 of the APA.

Mr. Renteria asks this Court to declare the Attorney General's promulgation of § 241.8 legally invalid, as it exceeds the scope of its enabling statutory authority. Since the legally invalid interpretation was applied to remove him without proceedings, he further requests a declaration that his rights to proper removal proceedings before being removed were violated. Finally, he requests this Court declare at least that he be granted proper removal proceedings as guaranteed in §§ 1229, 1229a before he is removed from this country. It should be noted again that Mr. Renteria is not contesting his removability here; he is only pleading for his right to proper proceedings before he is removed. That way he can at least have the opportunity to apply for relief from removal which Congress has expressly provided for aliens like him. *See* 8 U.S.C. § 1229b(b) (Supp. 1997).

2. The INS owed a duty to Mr. Renteria to grant him proper removal proceedings, and he was not granted those proceedings before being removed; a mandamus ordering the INS to allow him to return to the United States for proper proceedings is in order.

A writ of mandamus under 28 U.S.C. §§ 1361 and 1651 is necessary to remedy the legal wrong done to Mr. Renteria. First, he requests this Court grant a writ of mandamus compelling the INS to permit his return to the United States. No other remedy will place him in the same position he was in before Respondents violated his

rights and removed him without proper removal proceedings. In addition, he will have no chance to receive proper removal proceedings without being allowed back into this country. Mr. Renteria further seeks a writ of mandamus compelling Respondents to fulfill the duty owed to him of placing him in proper removal proceedings before removing him from the United States.

CONCLUSION

For the foregoing reasons, Mr. Renteria respectfully prays as follows: (1) that this Court hold that it has jurisdiction to review his claim; (2) that this Court find that the Attorney General's promulgation of 8 U.S.C. § 1231(a)(5) in § 241.8 was in excess of statutory authority and therefore violated the APA; (3) that this Court further find that the INS's application of the unlawfully promulgated regulation to remove him from the United States resulted in Mr. Renteria being unlawfully removed from this country; (4) that this Court declare his right to proper removal proceedings before being removed; and finally (5) that this Court compel the INS to allow him to return to the United States so he can be afforded proper proceedings before being removed.

Dated: April 21, 1999 and

Respectfully submitted,

SIMON M. AZAR-FARR
SIMON AZAR-FARR & ASSOC., P.C.
2313 North Flores
San Antonio, Texas 78212
(210) 736-4122 Telephone
(210) 736-4143 Facsimile
Attorney for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50536
Summary Calendar

RICARDO RENTERIA-PRADO,

Plaintiff-Appellant,

versus

KENNETH L. PASQUARELL, as District Director of the San Antonio District of Immigration and Naturalization Service; DORIS MEISSNER, INS Commissioner; THE IMMIGRATION AND NATURALIZATION SERVICE, as an agency of the United States; JANET RENO, as the Attorney General of the United States,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas
(SA-97-CV-1489)

Before REAVLEY, BENAVIDES and PARKER, Circuit Judges.

PER CURIAM:*

---

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent

In this immigration appeal, Ricardo Renteria-Prado ("Renteria") appeals the district court's dismissal of his action for declaratory and mandamus relief contesting the Attorney General's interpretation and application of § 241(a)(5) of the Immigration and Nationality Act ("INA"), which authorizes the Attorney General to reinstate a prior order of removal if, after having been removed or having voluntarily departed pursuant to that order, an alien subsequently illegally reenters the United States. *See* Immigration and Nationality Act § 241(a)(5), 8 U.S.C. § 1231(a)(5). Renteria claimed that this provision only authorizes reinstatement of *removal* orders and not *exclusion* orders, and that the INS unlawfully reinstated his prior order of exclusion and removed him from the country without first placing him in formal removal proceedings pursuant to 8 U.S.C. §§ 1229 and 1229a. The district court dismissed the case for lack of subject matter jurisdiction, holding that INA § 242(g), 8 U.S.C. § 1252(g), eliminated the court's jurisdiction to hear Renteria's claims because they arose from a decision to execute a removal order, which the INA defines to include exclusion orders. The district court further held that INA § 241(a)(5) itself prohibited the court from reviewing the reinstated removal order. Because we construe § 242(g) to preclude a review of claims arising from a decision or action of the Attorney General to reinstate and execute a prior order of exclusion, we agree that the district court lacked subject matter jurisdiction over Renteria's claims.

---

except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The questions presented in this appeal are (1) whether INA § 242(g) eliminates both the district court's and this court's jurisdiction to review claims arising from a decision or action to reinstate and execute a prior exclusion order, and (2) whether Renteria's claims are within the scope of § 242(g). We have jurisdiction to determine whether the district court lacked jurisdiction. *See New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 883 (5th Cir. 1998); *Ligurotis v. Whyte*, 951 F.2d 818, 819 n.1 (7th Cir. 1992) ("[Courts of appeals] certainly possess jurisdiction to determine whether the district court correctly held it was without jurisdiction."). We review the district court's dismissal for lack of subject matter jurisdiction *de novo*, taking the factual allegations as true. *See EP Operating Ltd. Partnership v. Placid Oil Co.*, 26 F.3d 563, 566 (5th Cir. 1994). We answer both questions in the affirmative and conclude that neither the district court nor this court have jurisdiction over Renteria's claims.

INA § 242(g) was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), which significantly restructured portions of the INA and became effective on April 1, 1997. The IIRIRA eliminated the prior distinction between "exclusion" and "deportation" and consolidated the two concepts into what is now termed "removal." *See Humphries v. Various Fed. USINS Employees*, ___ F.3d ___, ___, No. 96-10383, slip op. 1652, 1655 n.1 (5th Cir. Jan. 21, 1999). The IIRIRA also limited the scope of judicial review of immigration decisions by enacting new § 242.

The express language of § 242(g) eliminates judicial review of a claim "arising from the decision or action by

the Attorney General to . . . execute removal orders against any alien under this chapter." INA § 242(g), 8 U.S.C. § 1252(g). Renteria argues that based on the plain language of the statute, this provision applies exclusively to orders of *removal* and not to orders of *exclusion* or *deportation*. This contention is without merit. Another provision of the IIRIRA, § 309(d)(2), expressly defines the term "removal order" to include an order of exclusion and deportation. *See* IIRIRA § 309(d)(2), Pub. L. No. 104-208, 110 Stat. 3009-627 (1996) (codified as amended at 8 U.S.C. § 1101 note). Read together, these provisions of the INA indicate that a decision to execute an order of exclusion and deportation is clearly contemplated within the meaning of § 242(g). This construction is consistent with the few decisions in this and other circuits applying § 242(g), none of which have adopted the narrow construction urged by Renteria. *See Humphries*, ___ F.3d at ___, No. 96-10383, slip op. at 1662 (holding that claim that INS agents conspired to exclude the appellant in retaliation for the exercise of his First Amendment rights arose from the Attorney General's decision to place him in exclusion proceedings); *Auguste v. Reno*, 152 F.3d 1325, 1329 (11th Cir. 1998) (holding that § 242(g) divested district court of jurisdiction to decide habeas petition of alien seeking review of his order of deportation); *Ramallo v. Reno*, 114 F.3d 1210, 1213 (D.C. Cir. 1997) (holding that the district court "indisputably" lacked jurisdiction to review a decision to execute a deportation order; stating that such a claim "falls squarely within the express terms of the newly amended Section 242"), *cert. pending*. We hold that § 242(g) eliminates both the district court's and this court's jurisdiction to review claims arising from a

decision or action to execute an order of exclusion and deportation.[1]

Renteria's claims are within the scope of § 242(g). His claims are essentially that § 241(a)(5) does not authorize reinstatement of prior orders of exclusion, that his removal pursuant to that section was unlawful, and that he is entitled to be placed in removal proceedings. Renteria's goal in bringing the instant action is to invalidate the reinstated removal order and to require the INS to place him in removal proceedings so that he can seek relief from the removal order. His claims are "connected directly and immediately with a 'decision or action by the Attorney General to . . . execute removal orders.' " *Humphries*, ___ F.3d at ___, No. 96-10383, slip op. at 1661.

Renteria's arguments that his claims are not within the scope of § 242(g) hinge on his narrow definition of the term "removal order" and are wholly without merit. Additionally, Renteria cannot assert jurisdiction under §§ 702 and 704 of the Administrative Procedures Act because § 242(g) eliminates our subject matter jurisdiction "notwithstanding *any* other provision of law." INA § 242(g), 8 U.S.C. § 1252(g) (emphasis added). Because Renteria's claims arise from a decision to execute an order of removal, neither the district court nor this court have jurisdiction to review his claims.

---

[1] In so holding, we reject Renteria's contention that § 309(d)(2) only applies to removal, exclusion or deportation orders entered after April 1, 1997. This argument is wholly without merit and is not supported by any authority. Section 309(d)(2) simply clarifies the meaning of the term "order of removal" and does not raise any retroactivity concerns.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RICARDO RENTERIA-PRADO, Plaintiff, V. KENNETH L. PASQUARELL, as Director of the San Antonio District of the Immigration and Naturalization Service, *et al.*, Defendants.	*	SA-97-CA-1489

ORDER

On this day came on to be considered the above-styled and numbered cause. Pending before the Court is the defendants' motion to dismiss to which the plaintiff has filed a response. The defendants have replied to the plaintiff's response. Upon consideration, the Court is of the opinion that the motion to dismiss should be granted.

Also before the Court is the plaintiff's motion for leave to amend to which the defendants have filed objections. Upon consideration, the Court is of the opinion that the motion should be denied.

In plaintiff's declaratory action and writ of mandamus, the Attorney General's application and interpretation of § 241(a)(5), 8 U.S.C. § 1231(a)(5) of the Immigration and Nationality Act ("INA") is contested. The decision of the Immigration and Naturalization Service ("INS") to reinstate a previous order of exclusion

and remove plaintiff from this country is the point of contention.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, 110 Stat. 3656 ("IIRIRA") reworked entire sections of the INA. The new removal procedures contained therein apply to proceedings initiated after April 1, 1997. Application of INA § 242(g), 8 U.S.C. § 1252(g) was excepted from the April 1, 1997 effective date and applied immediately to all past exclusion, deportation and removal proceedings under the Act. IIRIRA § 306(c)(1). INA § 242(g), 8 U.S.C. § 1252(g) provides that no court shall have jurisdiction on a claim arising from the execution of removal orders against an alien. As the plaintiff's present claims arise from a decision to execute a removal order against him, this Court's jurisdiction to review is eliminated. Additionally, pursuant to INA § 241(a)(5), 8 U.S.C. § 1231(a)(5), prior orders of removal are to be reinstated and are not subject to review. Accordingly, the Court finds that INA § 242(g), 8 U.S.C. § 1252(g), precludes the Court from exercising jurisdiction to hear plaintiff's claims as they arise from a decision to execute a removal order against him. In addition, § 241(a)(5), 8 U.S.C. § 1231(a)(5) itself, prohibits the Court from reviewing the reinstated removal order.

In any event, the Court finds that the exclusion order was properly reinstated. Plaintiff has no statutory right to be placed in removal proceedings pursuant to 8 U.S.C. § 1229 and 1229a. Statutory authority pursuant to INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) allowed the INS to reinstate the order of exclusion as to plaintiff. Congress

specifically provided in IIRIRA § 309(d)(2) that for purposes of carrying out the act, any reference to an order of removal is to be deemed as including a reference to an order of exclusion. Plaintiff has been given notice and an opportunity to be heard. He received a determination from an immigration officer as to whether he had previously been excluded and deported and whether he reentered this country unlawfully. No further administrative hearing is necessary. Plaintiff received all due process to which he was entitled. As the Court is without jurisdiction over this case as noted above, no injunctive relief can be granted under the All Writs Act. 28 U.S.C. § 165(a). Injunctive relief may only be granted in *aid* of this Court's jurisdiction. Furthermore, as no nondiscretionary duty (statutory or constitutional) is owed to plaintiff by the INS, there is a failure to state a claim for mandamus relief. No declaratory relief may be granted plaintiff as there has been a failure to state a cognizable claim for any legal violation.

Lastly, plaintiff has filed an opposed motion for leave to amend. Obscurely, plaintiff alleges that the INS selectively applies INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) to aliens similarly situated to plaintiff without a rational basis to a legitimate government interest. Other than the conclusory statement itself, no factual allegations accompany this claim. Plaintiff is essentially seeking a review of a removal order any way he can get it. Assuming jurisdiction for argument, for the reasons asserted in the defendants' objections to the motion seeking leave to amend, the amendment would be futile as plaintiff could not state a claim upon which relief could be granted.

For the foregoing reasons, the plaintiff's motion for leave to amend is **DENIED**. The defendants' motion to dismiss is hereby **GRANTED**.

So **ORDERED** this **26th** day of May, 1998.

/S/ _____
H.F. GARCIA
United States District Judge

Section 241 of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1231:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed.

(5) Reinstatement of removal orders against aliens illegally reentering. If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

Section 242 of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1252:

Judicial review of orders of removal

(g) Exclusive jurisdiction. Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8 C.F.R. 241.8: Reinstatement of removal orders.

(a) Applicability. An alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such circumstances.

Sec. 306(c)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546:

(c) Effective Date:

(1) In General: Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under subsection 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

Secs. 309(a) and (c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546: Effective Dates; Transition:

(a) In General: Except as provided in this section and section 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the

enactment of this Act (in this title referred to as the "title III-A effective date").

(c) Transition for Aliens in Proceedings. – (1) General rule that new rules do not apply. – Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of the title III-A effective date – (A) the amendments made by this subtitle shall not apply, and (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

Sec. 309(d)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546:

(d) Transitional References: For purposes of carrying out the Immigration and Nationality Act, as amended by this subtitle,

(2) any reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation.

Supreme Court, U.S.
FILED
JUN 23 1999
CLERK

(2)

No. 98-1698

In the Supreme Court of the United States

RICARDO RENTERIA-PRADO, PETITIONER

v.

KENNETH L. PASQUARELL,
DISTRICT DIRECTOR, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
MICHELLE R. SLACK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1698

QUESTION PRESENTED

Whether 8 U.S.C. 1252(g) (Supp. III 1997), which deprives the district courts of jurisdiction over any claim "arising from the decision or action by the Attorney General to * * * execute removal orders against any alien," refers solely to removal orders entered after April 1, 1997, the general effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, or whether it also covers claims arising out of the execution of exclusion and deportation orders entered under pre-IIRIRA law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Auguste v. *Reno*, 152 F.3d 1325 (11th Cir. 1998)	9
Humphries v. *Various Fed. USINS Employees*, 164 F.3d 936 (5th Cir. 1999)	7
Lalani v. *Perryman*, 105 F.3d 334 (7th Cir. 1997)	10
Ramallo v. *Reno*, 114 F.3d 1210 (D.C. Cir. 1997), cert. denied, 119 S. Ct. 1139 (1999)	9
Reno v. *American-Arab Anti-Discrimination Comm.*, 119 S. Ct. 936 (1999)	8, 11

Statutes and regulation:

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546	3
Tit. III, 110 Stat. 3009-575:	
Subtit. A, 110 Stat. 3009-575	5, 9, 12, 13
§ 304(a), 110 Stat. 3009-587	3
§ 305(a)(3), 110 Stat. 3009-598	5
§ 306(a)(2), 110 Stat. 3009-607	5
§ 306(c)(1), 110 Stat. 3009-612	5, 10, 11
§ 309(a), 110 Stat. 3009-625	9
§ 309(d), 110 Stat. 3009-627	12
§ 309(d)(2), 110 Stat. 3009-627	5, 6, 7, 8, 9, 10, 12, 13
Subtit. B, 110 Stat. 3009-627:	
§ 324(a), 110 Stat. 3009-629	13
§ 345(a), 110 Stat. 3009-637	13

Statute and regulation—Continued: Page

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(g) (Supp. III 1997) 12, 13
8 U.S.C. 1182(a)(19) (1988) 3
8 U.S.C. 1182(d)(12)(A) (Supp. III 1997) 12, 13
8 U.S.C. 1225(b) (1982) 2
8 U.S.C. 1229 (Supp. III 1997) 4, 6
8 U.S.C. 1229a (Supp. III 1997) 3, 4, 6, 7
8 U.S.C. 1229b (Supp. III 1997) 4
8 U.S.C. 1231(a)(5) (Supp. III 1997) 4, 5, 6
8 U.S.C. 1252 (Supp. III 1997) 6, 7, 8, 10, 11
8 U.S.C. 1252(g) (Supp. III 1997) 5, 6, 7, 8, 9, 10, 11, 12
8 U.S.C. 1326 13
8 U.S.C. 1326(a) (Supp. III 1997) 12
8 C.F.R. 3.19 12

In the Supreme Court of the United States

No. 98-1698

RICARDO RENTERIA-PRADO, PETITIONER

v.

KENNETH L. PASQUARELL,
DISTRICT DIRECTOR, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-6) is unreported. The opinion of the district court (Pet. App. 7-10) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1999. The petition for a writ of certiorari was filed on April 22, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Mexico who first sought admission to the United States on April 15, 1985, presenting an immediate relative immigrant visa. The examining officer was unable to conclude, however, that petitioner was "clearly and beyond a doubt" eligible to enter the U.S. as an immigrant, see 8 U.S.C. 1225(b) (1982). Petitioner gave a sworn statement that he had paid his spouse, Arlene Vidales, a United States citizen, $500 to marry him, and had promised to pay her another $500 after he was admitted as an immigrant. The Immigration and Naturalization Service (INS) commenced exclusion proceedings against petitioner based on his failure to have a valid unexpired immigrant visa and his having obtained a visa by fraud or misrepresentation of a material fact, and paroled him into the country so that he could attend an exclusion hearing before an immigration judge (IJ). See Court of Appeals Record Excerpts (C.A. R.E.) 284-285.

On October 10, 1985, an IJ found petitioner excludable as charged. Although petitioner and Vidales asserted at the exclusion hearing that their marriage was *bona fide*, the IJ found that testimony to be not credible, and sustained the INS's allegation that petitioner and Vidales had entered into a marriage ceremony for the sole purpose of evading the immigration laws. C.A. R.E. 298-299. The IJ entered an order excluding and deporting petitioner from the United States. C.A. R.E. 293.

Petitioner appealed the IJ's exclusion order to the Board of Immigration Appeals (BIA). In late 1985, while his appeal to the BIA was pending, petitioner left the United States and then entered again unlawfully, without inspection by an immigration official. On May

7, 1987, petitioner divorced Vidales. On July 11, 1987, he married Emerita Elizalde, a United States citizen. The couple have two children who are United States citizens. Pet. 3.

On August 16, 1990, the BIA dismissed petitioner's appeal, sustaining the IJ's determination that petitioner's previous marriage to Vidales was a sham. C.A. R.E. 284-289. On December 24, 1990, petitioner's current spouse petitioned the INS on behalf of petitioner for an immigrant visa. The INS approved that petition, and forwarded it to the U.S. consulate in Ciudad Juarez, Mexico. Petitioner traveled to Ciudad Juarez to meet with a U.S. consular officer. The consular officer, however, found petitioner inadmissible under 8 U.S.C. 1182(a)(19) (1988) because of his previous attempt to immigrate based on a fraudulent marriage. Petitioner then returned to the United States without inspection. C.A. R.E. 141-143, 191.

2. On September 30, 1996, Congress enacted into law the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. IIRIRA comprehensively revised the Immigration and Nationality Act (INA), and in particular abolished the INA's old distinction between deportation and exclusion proceedings, replacing them with a new unitary form of proceeding, known as "removal." See IIRIRA § 304(a), 110 Stat. 3009-587 to 3009-597; 8 U.S.C. 1229a (Supp. III 1997). IIRIRA also added a new provision to the INA designed to expedite the removal of aliens who return illegally to the United States after having been previously ordered removed. Under that provision,

> [i]f the Attorney General finds that an alien has reentered the United States illegally after having

> been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. 1231(a)(5) (Supp. III 1997). Thus, if an alien has been ordered removed, leaves the United States (either voluntarily or pursuant to a warrant of removal), reenters the United States illegally, and is apprehended in the United States, the Attorney General need not commence another round of removal proceedings against the alien, but may simply reinstate the prior removal order and execute it once more.

On July 18, 1997, petitioner was apprehended by the INS. On July 22, 1997, the INS found that petitioner had reentered the United States after having been ordered removed and having departed. It therefore reinstated petitioner's prior exclusion order. C.A. R.E. 301, 303. Petitioner requested that the INS initiate full removal proceedings against him under 8 U.S.C. 1229 and 1229a (Supp. III 1997), so that he could apply for discretionary cancellation of removal under 8 U.S.C. 1229b (Supp. III 1997). The INS declined to do so.

3. On December 19, 1997, petitioner filed suit in district court, alleging that the INS had no authority to remove him from the United States except by instituting full removal proceedings under Section 1229a. Petitioner argued that Section 1231(a)(5), which provides for the reinstatement of a prior removal order against an alien who was ordered removed, left the country under an order of removal, and then reentered illegally, permits only for the reinstatement of removal orders

entered after April 1, 1997, the general effective date of IIRIRA, and does not permit the reinstatement of exclusion or deportation orders entered before that date. See C.A. R.E. 206-249.

The government argued that Section 1231(a)(5) does provide for the reinstatement of pre-IIRIRA exclusion and deportation orders. The government pointed out that Section 309(d)(2) of IIRIRA, 110 Stat. 3009-627, expressly provides that, "[f]or purposes of carrying out the [INA], as amended by [Subtitle A of Title III of IIRIRA,] * * * any reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation." Section 1231(a)(5) was added to the INA by Subtitle A of Title III of IIRIRA. See IIRIRA § 305(a)(3), 110 Stat. 3009-599. Therefore, the government argued, Section 1231(a)(5)'s provision for the reinstatement of an "order of removal" is deemed to include an "order of exclusion and deportation" entered under pre-IIRIRA law.

For similar reasons, the government argued that the district court lacked jurisdiction over petitioner's claim under 8 U.S.C. 1252(g) (Supp. III 1997), which was also added to the INA by Subtitle A of Title III of IIRIRA. See IIRIRA § 306(a)(2), 110 Stat. 3009-612. Section 1252(g) provides that, in general, the district courts have no jurisdiction "to hear any cause or claim * * * arising from the decision or action by the Attorney General to * * * execute removal orders against any alien." Moreover, IIRIRA expressly made Section 1252(g) immediately applicable "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under [the INA]." IIRIRA § 306(c)(1), 110 Stat. 3009-612. Therefore, the government argued, because petitioner's claim

arose out of the decision or action by the Attorney General to execute the prior exclusion order entered against him, which under Section 309(d)(2) of IIRIRA was deemed also to be a "removal" order within the meaning of the amended INA, the district court lacked jurisdiction to entertain the claim.

The district court agreed with the government and dismissed petitioner's complaint. Pet. App. 7-10. The court first ruled that it lacked jurisdiction over petitioner's claim because of Section 1252(g). The court explained that, under Section 1252(g), except as otherwise provided in Section 1252 itself, "no court shall have jurisdiction on a claim arising from the execution of removal orders against an alien. As [petitioner's] present claims arise from a decision to execute a removal order against him, this [c]ourt's jurisdiction to review is eliminated." *Id.* at 8. The court also concluded (*ibid.*) that "the exclusion order was properly reinstated" in any event, and that petitioner "has no statutory right to be placed in removal proceedings pursuant to" Sections 1229 and 1229a. The court noted (*id.* at 8-9) that Congress, in Section 1231(a)(5), "allowed the INS to reinstate the order of exclusion as to [petitioner]," and that Congress further provided in Section 309(d)(2) of IIRIRA that "for purposes of carrying out the act, any reference to an order of removal is to be deemed as including a reference to an order of exclusion. * * * No further administrative hearing is necessary." Finally, the court stated that petitioner "received all due process to which he was entitled." *Id.* at 9.

The court of appeals affirmed. Pet. App. 1-6. It concluded that Section 1252(g) divested the district court of jurisdiction to entertain petitioner's challenge to the reinstatement of his exclusion order. In so holding, the court of appeals first rejected (*id.* at 4-5) petitioner's

contention that Section 1252(g)'s bar of jurisdiction over claims based on the Attorney General's execution of "removal orders" applies only to orders of removal entered in removal proceedings under Section 1229a, as added by IIRIRA, and not also to orders of exclusion and deportation entered under pre-IIRIRA law. That argument, the court observed, is directly contrary to the plain language of Section 309(d)(2) of IIRIRA, which expressly defines the term "removal order" to include an order of exclusion and deportation. *Id.* at 4.

The court then held that petitioner's claim fell within the scope of Section 1252(g), as it was a challenge to the execution of the deportation order against him. Pet. App. 5. Petitioner's goal, the court noted, "is to invalidate the reinstated removal order and to require the INS to place him in removal proceedings so that he can seek relief from the removal order. His claims are 'connected directly and immediately with a "decision or action by the Attorney General to . . . execute removal orders."'" *Ibid.* (quoting *Humphries* v. *Various Fed. USINS Employees*, 164 F.3d 936, 943 (5th Cir. 1999), and 8 U.S.C. 1252(g) (Supp. III 1997)). Thus, "[b]ecause [petitioner's] claims arise from a decision to execute an order of removal, neither the district court nor this court have [*sic*] jurisdiction to review his claims." *Ibid.*

ARGUMENT

The court of appeals correctly concluded that petitioner's challenge falls within the scope of 8 U.S.C. 1252(g) (Supp. III 1997), which bars jurisdiction (except as specifically provided elsewhere in Section 1252) over claims arising from "the decision or action by the Attorney General to * * * execute removal orders." In addition, the court of appeals' decision is unpub-

lished, and it does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

Section 1252(g) precludes the courts, except as elsewhere provided in Section 1252 itself, from taking jurisdiction over "any cause or claim * * * arising from the decision or action by the Attorney General to * * * execute removal orders against any alien." At the outset, we note that the only dispute between the parties about the application of Section 1252(g) to this case is whether petitioner's exclusion order constitutes a "removal order[]" within the meaning of that Section. Petitioner does not dispute in this Court that the decision by the Attorney General to reinstate, and thereafter to execute, that exclusion order constitutes a "decision or action by the Attorney General to * * * execute" that order. See also Pet. App. 5 (noting that petitioner's claims are "connected directly and immediately" with the Attorney General's decision to execute the exclusion order against him). Therefore, this case raises no issue concerning the application of the Court's recent decision in *Reno* v. *American-Arab Anti-Discrimination Committee*, 119 S. Ct. 936 (1999) (*AADC*), which gave a more narrow construction to the scope of Section 1252(g) than the one advocated by the government in that case.

Petitioner's argument, rather, is that, because Section 1252(g) refers only to the decision of the Attorney General to execute "removal" orders, it excludes from the jurisdictional bar claims arising from her decision to execute an exclusion order entered before the comprehensive changes to the INA enacted by IIRIRA took full effect. That argument, however, is contrary to the plain language of Section 309(d)(2) of IIRIRA, which provides that, for purposes of carrying out the INA, as

amended by Subtitle A of Title III of IIRIRA (which includes Section 1252(g)), "any reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation." Accordingly, the "reference" in Section 1252(g) to orders of removal, barring jurisdiction over challenges to the execution of such orders, also includes orders of exclusion and deportation. And, as the court of appeals noted (Pet. App. 4), other courts of appeals have held that Section 1252(g) bars jurisdiction over challenges to the execution of deportation orders entered under pre-IIRIRA law, including those challenges that were pending in the courts on the date that Section 1252(g) took effect. See *Auguste* v. *Reno*, 152 F.3d 1325, 1329 (11th Cir. 1998); *Ramallo* v. *Reno*, 114 F.3d 1210, 1213 (D.C. Cir. 1997), cert. denied, 119 S. Ct. 1139 (1999).

Petitioner attempts to make several textually based arguments to show that Section 309(d)(2) does not apply to deportation orders entered before April 1, 1997. Those arguments are without merit. First, petitioner points out (Pet. 9) that Section 309(a) of IIRIRA provided that, except as otherwise provided in that statute, the amendments made by Subtitle A of Title III of IIRIRA were to take effect on April 1, 1997. See 110 Stat. 3009-625. Therefore, petitioner argues, Section 309(d)(2)'s "deeming" of removal orders to include exclusion and deportation orders applies only to removal orders entered under the new removal proceedings established by IIRIRA, and to deportation and exclusion orders entered after April 1, 1997, in proceedings that were opened before that date. But there is no evident reason why Congress would have wanted to treat deportation and exclusion orders entered before April 1, 1997, differently from those entered after that

date, and nothing in IIRIRA compels the conclusion that Congress intended to treat those two classes of orders differently for present purposes.

Even if Section 309(d)(2) did not take effect until April 1, 1997, nonetheless, once it took effect, its "deeming" of any reference to removal orders to include deportation and exclusion orders applied to bar jurisdiction under Section 1252(g) over challenges to the execution of *all* deportation and exclusion orders, including those that had been previously entered. Once IIRIRA came into effect on April 1, 1997, Section 1252(g) applied thereafter to all pending cases, unlike the other subsections of Section 1252, which applied only to removal proceedings commenced after that date. See *Lalani* v. *Perryman*, 105 F.3d 334, 336 (7th Cir. 1997). Moreover, Congress expressly provided that Section 1252(g) "shall apply *without limitation* to claims arising from *all* past, pending, or future exclusion, deportation, or removal proceedings." IIRIRA § 306(c)(1), 110 Stat. 3009-612 (emphasis added). Accordingly, after April 1, 1997, Section 1252(g) barred district court jurisdiction over all pending cases, including those involving previously entered deportation and exclusion orders. Especially since this case was not even filed until after April 1, 1997, the lower courts correctly concluded that Section 1252(g) deprived them of jurisdiction to hear petitioner's challenges.

Petitioner also points out that Congress did not limit Section 1252(g)'s jurisdictional bar to claims arising from the decision or action of the Attorney General to "commence removal proceedings" or "adjudicate removal cases," but rather barred jurisdiction over any action to "commence proceedings" or "adjudicate cases," which he reads as a specific and pointed decision to include pre-IIRIRA deportation and exclu-

sion proceedings and cases. Therefore, petitioner argues, Congress's use of the term "removal" only with reference to jurisdiction over challenges to removal *orders* has the significance of limiting the jurisdictional bar to challenges to removal orders, rather than pre-IIRIRA exclusion and deportation orders. Pet. 8, 11. That argument, however, is impossible to square with the language of Section 306(c)(1), which made Section 1252(g) applicable "without limitation" to claims arising from *all* "past, pending, or future exclusion, deportation, or removal proceedings." Under petitioner's construction, Section 1252(g) would not apply to decisions to execute past exclusion orders, and therefore it would not apply "without limitation" to all "past * * * exclusion * * * proceedings."

Moreover, Congress's use of the term "removal" in Section 1252(g) to modify "orders," and not "proceedings" and "cases," is more readily explained in a different way. As the title of Section 1252 ("Judicial review of orders of removal") makes clear, the principal subject matter of that Section is judicial review over the conduct and outcome of removal proceedings (including, in Section 1252(g), deportation and exclusion proceedings). It was unnecessary for Congress to use the term "removal" to modify "proceedings" and "cases," because it is obvious from the context that the terms "proceedings" and "cases" refer, at least principally if not exclusively, to removal proceedings and cases. The same would not necessarily have been true, however, if Congress had not modified "orders" with the term "removal." In removal proceedings, immigration judges enter many kinds of orders, including orders that Congress might not have intended to be covered by Section 1252(g). See *AADC*, 119 S. Ct. at 943 (noting that there are "many other decisions or actions that may be part of

the deportation process" that are not covered by Section 1252(g)); see also, *e.g.*, 8 C.F.R. 3.19 (IJ power to enter custody and bond orders). The use of the term "removal" to modify "orders" makes clear that Section 1252(g) precludes jurisdiction over challenges to decisions to execute *removal* orders, and not necessarily challenges to the execution of every order that an IJ enters in the course of a removal proceeding. (Of course, other doctrines, such as the prohibition against judicial review of interlocutory orders entered by administrative agencies, presumably would preclude review of most such orders until after the entry of a final removal order.)

Petitioner further observes (Pet. 22-23) that, although Congress in IIRIRA generally replaced the terms "deportation" and "exclusion" with the term "removal" (reflecting the general replacement of deportation and exclusion proceedings by removal proceedings), in a few places Congress retained the term "deportation" but added "removal" as well. See 8 U.S.C. 1101(g), 1182(d)(12)(A), 1326(a) (Supp. III 1997). Therefore, petitioner argues, Congress's use of the term "removal" should generally be read to have the meaning only of *removal* proceedings and orders, and not also deportation and exclusion proceedings and orders.

The isolated instances in which Congress retained "deportation" but also added "removal," however, are also explained in a different way. Section 309(d)(2), which deems all references to "an order of removal" to include a reference to an order of deportation or exclusion, applies to the INA as amended by Subtitle A of Title III of IIRIRA. See IIRIRA § 309(d), 110 Stat. 3009-627 ("[f]or purposes of carrying out the [INA], as amended by this subtitle"). The three examples in the

INA to which petitioner refers, where Congress retained use of "deportation," were not substantively amended by Subtitle A of Title III of IIRIRA. Section 1101(g) of Title 8 was not amended at all by IIRIRA, except for the new reference to removal orders. Section 1182(d)(12)(A) of Title 8 was added to the INA by Section 345(a) of IIRIRA, which falls outside Subtitle A of Title III, see 110 Stat. 3009-638, as does Section 324(a) of IIRIRA, which amended 8 U.S.C. 1326, see 110 Stat. 3009-629. Congress may have concluded that, because those provisions of the INA were not amended by Subtitle A of Title III, references to an order of "removal" in those provisions might not be "deemed" to include an order of deportation by operation of Section 309(d)(2). Therefore, Congress might well have concluded that a separate reference to an order of deportation was necessary to ensure that the provisions applied to orders of deportation entered before IIRIRA took full effect on April 1, 1997, as well as orders of removal entered after that date.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
MICHELLE R. SLACK
Attorneys

JUNE 1999